Moreover, the rule that the President has no power, as well as no duty, to surrender a fugitive in the absence of a treaty of extradition, has been generally accepted. *Ex parte M'Cabe*, 46 Fed. Rep. 363; Spear, Extradition, 13; Wharton, International Law Digest, § 268; *Washburn's Case*, 4 Johns. Ch. Rep. 106 (*semble*, *contra*).

The question whether Congress has this power has never been considered to any extent, since, until recently, Congress has not attempted to regulate or provide for extradition except to countries having extradition treaties with the United States. As extradition is essentially an executive function, the power of extraditing in the absence of treaties, if existing, would most naturally seem to appertain to the executive, and the only way in which to support the right of Congress so to provide for extradition appears to be the broad ground that Congress has power to pass any law not prohibited by the constitution. It may be that it is desirable to adopt a principle that will sustain the power in question either in the President or in Congress; but any principle that will reach this result is hardly consistent with the former rule of constitutional construction that the federal government is one of delegated powers only.

If Congress has this power, the Supreme Court has recently missed an opportunity of recognizing its existence. *Neeley* v. *Henkel*, 21 Sup. Ct. Rep. 302. The court affirmed the judgment of the lower court in denying the application for a writ of *habeas corpus* made by Neeley, who was detained pending extradition to Cuba under the provisions of the act of June 6, 1900, providing for the extradition of criminals in certain cases "to foreign countries or territories . . . occupied by or under the control of the United States." 31 Stat. 657, ch. 793. The constitutionality of this act was upheld upon the ground that it was a proper means of carrying out the duty assumed by the United States in the treaty of Paris, to "discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property." 30 Stat. 1755. The case is probably correctly decided, upon the grounds intimated by the court. But the question of the power of Congress to pass such a statute in the absence of a treaty obligation is expressly left undecided; the determination of that question must await an attempt to extradite to a country occupied by the United States during a future war, or, since the obligation of the treaty does not extend to Porto Rico or the Philippines, an attempt to extradite to those islands, should they be considered a "foreign country or territory" within the meaning of the act.

Recognition of Trustees at Law. — A trustee in his representative capacity, as distinguished from his personal capacity, unlike an executor, has never been recognized as a separate person by the common law. Yet the possibility of such a recognition arising was suggested by a recent case. *Parmenter* v. *Barstow*, 47 Atl. Rep. 365 (R. I.). The plaintiff brought action against the defendant "as trustee," alleging that, owing to the negligence of a stone-cutter employed on the trust property, her eye had been put out by a piece of flying stone. The court held that, if the defendant was liable, it was in his personal, not in his representative capacity, and on this ground sustained a demurrer. Although no situation is mentioned in which judgment ought properly to be given out of the trust estate against the trustee as such, to be levied on the trust estate,

yet the decision clearly recognizes the possibility of such a judgment, if a proper case should come before the court, as otherwise the addition of the word trustee to the defendant's name, would be mere surplusage, and no ground for demurrer. The case follows a New York decision. *Keating* v. *Stevenson*, 24 N. Y. App. Div. 604. But other American decisions are *contra*. *Odd Fellows Hall Asso.* v. *McAllister*, 153 Mass. 292; *Blackstone Nat. Bank* v. *Lane*, 13 Atl. Rep. 683 (Me.); *Sass* v. *Hirschfield*, 56 S. W. Rep. 941 (Tex. Civ. App.).

It may be argued that the error in the principal case is merely an unimportant one of pleading. But at the present day certain causes tend strongly to make the courts recognize trustees in their representative capacity, so that any error is dangerous which suggests the propriety of such recognition. In the first place the courts enter judgment against receivers as such. The true ground for this is that receivers are mere officers of the court of equity. The court has title to the property, and without its consent no suit can be brought against them. Thus they differ fundamentally from trustees who, having title, come under any liability resulting from its possession. Yet receivers have been called quasi-trustees, and their liability placed by some courts on the same footing as that of ordinary trustees. *Camp* v. *Barney*, 4 Hun, 373. As a result, it has been sometimes felt that if judgment may be entered against a receiver as such, it ought to be entered against a trustee in a similar manner. In the second place, there are two instances in which creditors of trustees may reach the trust estate directly. Creditors of an insolvent trustee, who has a right to pay his indebtedness out of the trust property, may now, in many instances, reach such property itself in equity. 14 HARVARD LAW REVIEW, 67. Likewise it has become common for a trustee to enter into obligations expressly stipulating that he shall not be personally liable, and that creditors must look solely to the trust estate. In such cases an equitable lien on the estate has been sometimes allowed under proper circumstances. *Noyes* v. *Blakeman*, 6 N. Y. 567. These decisions, since they permit the creditor to look to the trust property rather than to the trustee for his security, are likely to strengthen the notion that the latter may have a position before the law in his representative capacity.

As the law of trustees has grown up solely under equity jurisdiction, the consequences of recognizing trustees at law would, if logically carried out, be far reaching. It would result, of course, that whenever the trustee was liable as such, he could not be personally liable, as necessarily but a single liability would be incurred either in the one capacity or the other. The greatest care in examining trust property would, therefore, have to be exercised by those dealing with trustees. It would likewise result that a trustee could not pass a good title to a *bona fide* purchaser for value, for, if he held title only in his representative capacity, he could not pass it in his personal capacity. Such fundamental changes as these, if ever thought advisable, ought only to be the results of legislation, and clearly could not have been contemplated by the court in the principal case.

VACATING SENTENCE IMPOSED UNDER PLEA OF GUILTY. — A rather unusual situation was presented in a recent case in Illinois. *People* v. *Arkins* (Criminal Ct., Cook Co.), 33 Chicago Legal News, 192. The defendant, on being arraigned under an indictment charging him with having